

The most logical solution seems to rest in a balance of policies. The power to depart from the letter, in supposed adherence to the spirit, should not be exercised unless the policy of the law is saved. *Burns v. McCormick*, ante. However, let there once be established a contract (by reliable, disinterested witnesses, by an authentic memorandum which shows the intent of the parties, or by other proof which admits of no doubt) which contravenes no sound public policy, which is not unconscionable, which appeals to the conscience of the court and accords with natural justice, the proposition that the performance must be "unequivocally referable to the agreement" becomes of no moment—except as it may have had a bearing on the establishment of the contract. *Salem v. Finney*, 127 Misc. 387, 215 N.Y. Supp. 553 (1926). Such a view would be feasible because it has been held in Ohio that it is not error to admit parol evidence of the terms of the contract before proof of its part performance has been given. *Shahan v. Swan*, ante. We do not have in mind a result such as that reached in *Gramann v. Borgmann*, 14 N.P. (N.S.) 449, 31 O.D. 668 (1913), where it was decided that the oral land contract was established by clear and convincing evidence where two interested witnesses testified to events occurring 41 years before. However, if this approach to the problem were adopted with due caution and regard to a balance of the fundamental policies involved, the full intent and purpose of the statute could be better realized.

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RIGHT OF A BANKRUPT TO SUE ON A CLAIM WHICH AROSE BEFORE BANKRUPTCY WHICH WAS NOT PROSECUTED BY THE TRUSTEE

This question was incidentally raised in Ohio in the case of *Whitehead, Adm'r v. Parsons*, 16 Ohio Abs. 274, Lucas County Ct. of Appeals, Jan. 2, 1934. Parson conveyed land to Pickard, who was to make part payment in cash and give a purchase money mortgage for the balance. Pickard never paid the full amount of the cash payment. Later, Parsons was declared a bankrupt, the estate administered and closed, and the bankrupt discharged. The transaction between Parsons and Pickard was included in the schedule, but its true nature was not disclosed. This action was brought to recover the unpaid balance of the cash payment from Whitehead, who was Pickard's administrator.

The court did not decide the question in which we are interested, but, in a dictum, it said, "She (Parsons) could not, after being adjudicated a bankrupt and having received her discharge, ordinarily bring suit upon any right of action that was vested in her at the time she filed her petition in bankruptcy."

Under the Bankruptcy Act of 1898, the property and powers of the bankrupt, as set out in Sec. 70a (11 U.S.C.A. 110a), and the "rights, remedies and powers" of creditors, as mentioned in Sec. 47a-2 (11 U.S.C.A. 75a-2), are vested in the trustee "by operation of law." In particular, Sec. 70a

provides that title to: "(1) documents relating to property; (2) interests in patent rights , (3) powers which he (the bankrupt) could have exercised for his own benefit , (6) rights of action arising upon contracts or for unlawful taking or detention of or injury to, his property" shall be vested in the trustee. The provision for vesting title in the trustee was practically the same in the Bankruptcy Act of 1867. This is mentioned, because some of the cases considered were decided under the former act.

The only provision of the Bankruptcy Act which mentions the revesting of title in the bankrupt is Sec. 70f. 11 U.S.C.A. 110f. This provides that upon confirmation of a composition agreement, title to all his property shall revert in the bankrupt.

If this provision were as far as the law went, there would be, in the absence of a composition agreement, no possibility for a bankrupt to sue on a claim which arose before bankruptcy and which was of the type which would pass to the trustee. However, the courts have developed the doctrine of abandonment, which allows the revesting of title to property in the bankrupt. This doctrine has grown up to provide for the disposition of burdensome real property and leases. It states that a trustee in bankruptcy is not bound to accept real property when it will be a charge on the estate. If the trustee does not take possession of the property within a reasonable time, it will be assumed that he elected not to accept the property, and title will revert in the bankrupt. *Sparhawk v. Yerkes*, 142 U.S. 1, 35 L. ed. 915, 13 S.Ct. 104 (1891), *Dushane v. Beall*, 161 U.S. 513, 40 L. ed. 791, 16 S. Ct. 637 (1896), *Collier on Bankruptcy* (13d) p. 1738-39; *Remington on Bankruptcy* (3d) Sec. 1154-60.

The courts have applied this doctrine to choses in action. The bankrupt cannot, however, sustain a claim that title to a chose in action has reverted in him unless he shows (1) that the trustee had notice of the chose in action, and (2) that he elected not to prosecute it. *Buckingham v. Buckingham*, 36 O.S. 68, III Longsdorf's Notes 830 (1880). There can be no election to abandon where the chose in action is concealed from the trustee, *First Nat. Bank v. Lasater*, 196 U.S. 105, 25 S. Ct. 206, 49 L. ed. 408 (1904), and thus in case of failure to give actual notice or notice by schedule (inferentially concealing asset) there can be no abandonment. *Perkins v. Alexander*, 209 S.W. 789, 46 Am. Bb. R. 44 (Texas, 1919). In the absence of all evidence concerning the bankruptcy proceedings, it has been presumed that a trustee was appointed, and that he did not elect to abandon the claim. *Hutchinson v. Dobbins*, 30 Ga. App. 211, 122 S.E. 905, 4 Am. B. R. (ns) 315.

In cases involving personal property other than choses in action, the same principles apply, and if an election to abandon is shown, title to the property reverts in the bankrupt. *Sessions v. Romodka*, 145 U.S. 29, 12 S. Ct. 799, 36 L. ed. 609 (1892). Where the trustee has elected to abandon property, and the abandonment has been approved by the court, the court has no right to withhold the property from the bankrupt. *In re Wattle*, *In re Crane*, 62 Fed. (2d) 829 (1933), *Meyers v. Josephson*, 124 Fed. 734 (1903). Failure to administer funds received from a railroad pension, after notice, will bar the trustee's right to such funds. *Gilbert v. Norfolk Ry. Co.*, 171 S.E. 814, (W. Va. 1933).

There is no problem of abandonment if no trustee is appointed, for title

would not be divested from the bankrupt. He could later maintain action in his own name even though the cause arose before bankruptcy. *Rand v. Iowa Cent. Ry. Co.*, 186 N.Y. 58, 78 N.E. 574 (1906).

Where the bankrupt sues before the closing of the estate on a pre-bankruptcy claim, the tests for abandonment and the application of the doctrine have been practically the same. The trustee cannot be said to have abandoned a claim if he prosecutes it as soon as he finds out about it. *Hammond v. Whittredge*, 204 U.S. 538, 29 S. Ct. 396, 51 L. ed. 606 (1907). And, non-action by the trustee as long as a claim is uncollectible will not constitute such abandonment as will revest title in the bankrupt. *In re Wiseman and Wallace*, 159 Fed. 236 (1908). Under the Act of 1867, it was possible for action by the trustee to be barred before the closing of the estate. *U.S. Rev. Stat.* (2d) Sec. 5057. It was held that if the abandonment came after the action by the trustee was barred, action by the bankrupt would also be barred. *Kenyon v. Wrisley*, 147 Mass. 476, 18 N.E. 227, 1 L.R.A. 348 (1888). No analogous situation could arise today, for the statute of limitations in the present Bankruptcy Act provides that "suits shall not be brought by or against a trustee subsequent to two years after the estate has been closed." 11 U.S.C.A. 29d, Bankruptcy Act 11d.

New Hampshire courts have allowed bankrupts to prosecute actions before the estate was closed if an abandonment was shown. Non-action by the trustee after having notice of the claims constituted abandonment. *Towle v. Rowe*, 58 N.H. 394, *Ramsey v. Fellows*, 58 N.H. 707 (1789) (both under the Act of 1867), *Hubbard v. Gould*, 74 N.H. 25, 74 A. 608 (1906) (under the Act of 1898). The results were the same in the cases of *Morgan v. Ownbey*, 2 Harr. 437, 4 Am. B.R. (ns) 1123, 125 A. 418, Delaware, 1923) and *Leach v. Bank of Vollmer*, 47 Idaho 273, 274 Pac. 627, 14 Am. B.R. (ns) 694 (1924).

In situations similar to that of the principal case, the bankrupt has been allowed to prosecute an action after the closing of the estate and his own discharge where an abandonment is clearly shown. If property is once abandoned, it cannot be later reclaimed by the trustee. *Irwin v. Harris*, 189 N.C. 465, 127 S.W. 529 (1935), *In re Wattley*—supra. If the trustee fails to accept "onerous or unprofitable assets or rights," they revert to the bankrupt after the trustee's discharge, and he may maintain action on such right. *Metz v. Emery*, 110 Kan. 405, 204 Pac. 734, 48 Am. B.R. 24 (1933). "Where the trustee takes the affirmative action of getting the permission of the court to abandon property, the result is the same, and the abandonment is easier to prove. The bankrupt may sue after the closing of the estate and discharge. *In re Webb, Webb v. Raleigh Hdwr Co.*—54 Fed. (2d) 1065—1932.

Where neither an express or implied abandonment of an asset by the trustee is shown, the bankrupt would probably not be allowed to assert title to such asset. The Bankruptcy Act provides that where it is shown that unadministered assets exist, the estate may be re-opened. 11 U.S.C.A. 11 (8), Bankruptcy Act 2 (8). A discharged trustee cannot re-open an estate, *In re Paine*, 127 Fed. 246, 11 A.B.R. 351 (1904), but creditors, *In re Levy* 259 Fed. 314, 44 Am. B.R. 773 (1919) and the bankrupt himself, *In re Sayer* 210 Fed. 397 (1914) may re-open the estate on showing the existence of unadministered assets. The petition to re-open the estate must be brought

within a reasonable time, *In re Paine*—supra, and an estate cannot be re-opened to remove the bar of the statute of limitations provided in Sec. 11d of the Bankruptcy Act. *Kinder v. Scharf*—231 U.S. 517, 58 L. ed. 343, 34 S. Ct. 164—1913. Such a means for reaching unabandoned, unadministered property should, it is submitted, be exclusive.

If it were possible to show, in the principal case, that Parsons' trustee had notice of the claim against Whitehead's decedent, the case might be taken out of the category of cases in which the bankrupt may not "ordinarily bring suit" on a pre-bankruptcy claim.

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INJURY SUFFERED AS A RESULT OF VIOLATION OF HOURS OF LABOR STATUTE

The plaintiff in her petition alleged that she was sixteen years of age, as the defendant knew, and that she was employed by the defendant 12½ to 13½ hours per day, and 75 to 80 hours a week in violation of sections 12,996 of the Ohio General Code, which provided that no girl under eighteen should be employed more than eight hours in any one day nor more than forty-eight hours in any one week. Plaintiff further alleged that as a proximate result of defendant's violation of the statute, she became physically exhausted, suffered nervous breakdown, was forced to seek medical attention, was caused great embarrassment, and mental distress, and was damaged to the extent of \$15,000. The trial court sustained a demurrer to her petition, which the Court of Appeals reversed. The Supreme Court, Zimmerman, J., dissenting, held that the demurrer was properly sustained. *Mabley & Carew Co. v. Lee, a minor*, 129 Ohio St. 69 (1934).

The majority opinion recognized that plaintiff was attempting to maintain an action at common law, but held that the constitutional provision relating to Workmen's Compensation barred any such action. They did not decide, nor was it necessary for them to do so, whether the plaintiff could recover anything under that act.

Article II, section 35, of the Ohio Constitution provides that laws may be passed for the purpose of providing compensation to workmen and their dependents for death, injuries, or occupational disease, occasioned in the course of employment and that such compensation shall be in lieu of all other rights to compensation, or damages for such death, injuries, or occupational disease.

It would seem that plaintiff could not have recovered in Workman's Compensation for death, injury, or occupational disease. She is alive. She has no occupational disease. *Industrial Commission of Ohio v. Roth*, 98 Ohio St. 34, 38, 120 N.E. 172, 173, 6 A.L.R. 1463, 1465, (1918, General Code section 1465-68A. Now has she suffered an injury as the term has been construed in the act? The court has repeatedly held that the injury must be traumatic. *Industrial Commission of Ohio v. Armacost*, 129 Ohio St. 176 (1935), (there is no such evidence (of trauma) in the case now before us); *Industrial Commission of Ohio v. Middleton*, 126 Ohio St. 212, 184 N.E.